

New Department of Labor COVID-19 Guidance for Employers

Karen H Bromberg

The U.S. Department of Labor's ("DOL") Wage and Hour Division recently posted [useful guidance](#) for employers on common issues they are likely to face, or are already confronting, with respect to employee wages when responding to different COVID-19 scenarios. Guidance was also provided for issues relating to employee leave under the Family Medical Leave Act ("FMLA"). This alert covers the issues relating to wages under the Fair Standards Labor Act ("FSLA").

Here is what you need to know.

Pay to Non-Exempt Employees During Office Closures

The FSLA requires employers to pay their non-exempt employees only for the hours they actually worked. As such, if employers are forced to temporarily close their businesses due to COVID-19 issues, they are not required to pay non-exempt employees for hours they do not work. If telecommuting or working from home is provided as a reasonable accommodation, employers must pay non-exempt workers their hourly wage and at least time and one half the regular rate of pay for overtime hours worked from home. Employers are still required to maintain an accurate record of hours worked for all hourly employees, and are encouraged to work with employees to establish hours of work for employees who telework and a mechanism for recording each teleworking employee's hours of work.

Pay to Exempt Salaried Employees During Office Closures

Under the FSLA, salaried employees exempt from being paid overtime, if mandated by their employers to stay home due to COVID-19 issues, including an office closure, must be paid in full even if they complete only a partial week's work. The general rule is that employers are not obligated to pay exempt, salaried employees for a week in which they perform *no* work, but if they work any portion of the week, remote or otherwise, such employees are entitled to receive their full weekly salary.

Requiring Salaried, Exempt Employees to Use Vacation or Leave Without Pay During Office Closures

The FSLA does not require employers to provide paid vacation time. However, where an employer offers such a plan, the employer may direct salaried employees to use accrued leave or vacation days in the case of an office closure, whether for a full or partial day, provided that those employees still receive payment equal to their full guaranteed weekly salary. If the exempt employee does not have sufficient accrued time to cover the absence, the employee must still receive the full guaranteed salary for any week in which he or she performs any work in order to maintain the employee's exempt status.

Voluntary or Mandatory Telework Arrangements

An employer may either encourage or require employees to telework as an infection control or prevention strategy. Employers are encouraged to be accommodating and flexible with workers impacted by government-imposed quarantines. The DOL specifically notes that telework may be offered as a reasonable accommodation, and employers must provide such employees with the same hourly rate or salary. However, employers may not make such decisions based on protected characteristics, such as national origin, race, gender, age, or pregnancy status.

Reimbursement of Employee Telework Expenses

If an employee is required to work from home, an employer may not require that employee to pay for or reimburse the company for business expenses of the employer where doing so reduces the employee's earnings below the required minimum wage and overtime compensation. This means that the costs for internet access, personal phone, printers, paper, equipment, etc., which are incurred by a non-exempt employee in order to be able to telework cannot reduce that employee's earnings below the minimum wage and any required overtime compensation; exempt employees must be paid their guaranteed salary, which cannot be reduced by such costs incurred by an exempt employee in order to be able to telework.

As a practical matter, if an employer requires an employee to work remotely who is not normally set up to do so, it should consider whether it will need to reimburse the employee for any additional phone, internet, or other expenses incurred to enable the employee to telework at the company's request, where such costs are incurred beyond what the employee would have otherwise paid for his or her personal services.

Conclusion

The employment team at Cohen & Gresser will continue to review and summarize guidance for employers to consider when responding to COVID-19. As the COVID-19 situation continues to develop, we anticipate new rules and regulations. Importantly, the Families First Coronavirus Response Act, signed into law just last night, amends the FMLA to provide job protected paid leave for anyone who misses work due to a diagnosis of COVID-19, is required to quarantine, must take care of an ill or quarantined person, or is caring for children whose school has been suspended because of the virus. Other state and federal legislation impacting employers is under consideration.

Finally, please note that this guidance only addresses federal guidelines. Employers must be aware of the need to comply with wage and hour laws of the states in which they operate and should consult their counsel regarding their compliance with state and local wage laws. Moreover, employers should always see advice specific to their circumstances.

About C&G's Employment Group:

Employment attorneys at C&G represent employers and executives in a variety of litigation and counseling matters in the U.S., France and London. Our lawyers have significant experience counseling international clients, employers and top managers/executives, as well as representing them in litigation relating to various employment and labor-related issues.

The Author:



Karen H Bromberg
Partner

+1 212 957 7604

kbromberg@cohengresser.com

Karen leads the firm's U.S. Employment group. She regularly counsels management on a variety of employment matters, including employment contracts and offer letters, severance policies and separation agreements, restrictive covenants, confidentiality agreements, consulting and work for hire agreements, workplace privacy issues, compliance with mass-layoff regulations, and best practice employment policies with a focus on litigation avoidance and strategic planning. She regularly serves as outside employment counsel to privately and publicly held companies and advises management on employment-related compliance with federal, state and local laws, and assists clients in preparing employee handbooks and personnel policies, investigating employee and employer misconduct, drafting of client offer letters and agreements, and counseling clients on the management of wrongful termination claims.

About Cohen & Gresser:

Cohen & Gresser is an international law firm with offices in New York, Seoul, Paris, Washington, DC, and London. We have an outstanding record of success in high-stakes and high-profile litigation, investigations, and transactional work for our clients, including major financial institutions and companies across the world. Our attorneys have superb credentials, and are committed to providing the efficiency and personal service of a boutique law firm along with the quality and attention to detail that are the hallmarks of the best firms in the world. The firm has been recognized in a wide range of publications, including *Chambers* and *Legal 500*.

New York | Seoul | Paris | Washington DC | London

www.cohengresser.com

info@cohengresser.com

+1 212 957 7600



[View C&G's Profile](#)